95-416

Supreme Court, U.S.
FILED
SEP 5 1995
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JAMES SEABOLT,
Petitioner,
v.
TEXAS,
Respondent.

On Writ of Certiorari to the First Court of Appeals of Texas at Houston, Texas

PETITION FOR WRIT OF CERTIORARI

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September 1995

QUESTION PRESENTED

Whether the due process provision of Amendment XIV prevails over a state's caselaw and statute that provide for an unobjected-to hearsay principle that will screen a sufficiency of the evidence claim, yet declines to recognize the converse of the rule in the context of a withdrawal of a guilty plea where the defendant's burden is less.

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OPINION BELOW

The opinion of the Texas state appellate court, the Fourteenth Court of Appeals, at Houston, Texas, affirming the convictions and sentences was not published. A copy of the unpublished opinion of November 17, 1994, is attached as Appendix A. Petitioner then sought discretionary review with the Texas Court of Criminal Appeals; review was refused on June 7, 1995. A copy of that order is attached as Appendix B.

STATEMENT OF JURISDICTION

This petition is due on or before September 7, 1995. This Court has jurisdiction pursuant to 28 U.S.C §1257.

CONSTITUTIONAL PROVISION INVOLVED

The controversy here centers around the applicability of Amendment XIV to hearsay and its probative force.

STATEMENT OF THE CASE

Petitioner Seabolt was convicted of sexual assault by placing his finger in the female sexual organ of Jane Lee (a pseudonym), count 1, and Carrie Lane (a pseudonym), count 2, persons younger than seventeen, neither his spouse, (R1: 5), Texas Penal Code, §22.011.

Petitioner's cases were litigated before the trial court. On February 18, 1992, he entered a plea of not guilty to count 1 and a plea of no contest to count 2. (R.I: 15-16). On July 29, 1992, Petitioner's motion to withdraw his pleas was denied. He was sentenced to confinement for 12 years on each count. (R.I: 42, 45).

The testimony in support of the motion to withdraw

the pleas as to each count showed:

1. Candice Shelton, the mother of Carrie Lane, the complainant in count 2, testified that Petitioner should get probation because her daughter told her nothing happened between her and him. (R.4: 23-24).

2. Petitioner entered the pleas premised, in part, on the fact that Carrie Lane, the complainant in Count 2, and her mother, would testify that he should receive probation and not be imprisoned (R. 1: 36, 38);

3. Carrie Lane and her mother had a long-standing relationship with Petitioner and believed that the case had gotten out of hand. This was all reinforced through conversations between Candice Shelton, the mother of Carrie Lane, and Jim Skelton, Petitioner's trial attorney (R.1: 36);

4. After Carrie Lane and her mother, Candice Shelton, made known to the State their desires regarding sentencing, they were threatened by Jane Lee, the complainant in Count 1, and her mother, Madona Goodnight. The gist of that threat was that Carrie had told Jane that her mother's

present husband had sexually assaulted her. Jane said if Carrie and her mother continued to persist in requesting probation for Petitioner, this information would become public knowledge (R.1: 37, 4: 7, 8);

5. Petitioner disavowed the accusations in the complaining witnesses' statements as untrue. (R. 1: 38).

The trial court, *before any testimony* was heard on the subject, denied the motion to withdraw (R.4: 5), then, suddenly, changed her mind. (R.4: 11).

Candice Shelton, the mother of Carrie Lane, complainant in Count 2, testified for Petitioner on his motion to withdraw the plea in Count 2. (R.4: 12, et seq.).

She believed that Petitioner should get probation because "my daughter said nothing happened between her and him." (R.4: 23-24). There was no objection interposed.

Petitioner testified on his motion to withdraw the pleas. (R.4: 55 et seq.). He stated that, although State's Exhibit 1, his judicial confession, admits the facts of the indictment are forthright, that is not true, and in truth and fact, the basis of the indictment is false. (R.4: 71). He also denied the truth and accuracy of State's Exhibit 3, (R.7: 5), the written statement of Carrie Lane. (R.4: 68).

The trial court denied the motion to withdraw the pleas. (R. 4: 100).

On direct appeal Petitioner claimed that the trial court abused its discretion by not allowing withdrawal of the plea in count 2 before a finding of guilt and imposition of sentence. The gist of the claim was premised on Petitioner's motion, his testimony, and the unobjected-to hearsay statement of the complainant's mother that her daughter, the complainant, said nothing happened between Petitioner and her. The state court of appeals never addressed the significance of the hearsay statement, nor did the Texas Court of Criminal Appeals.

As to count 1, Petitioner also sought on direct appeal to have the plea set aside on abuse of discretion grounds. Additionally, Petitioner requested that, since the plea in count 2 should have been set aside, count 1 ought to be remanded for resentencing because of the possibility count 2 unconstitutionally influenced the sentencing in count 1.

REASONS FOR GRANTING THE WRIT

Under Texas law a defendant may withdraw his plea without assigning reason before judgment is pronounced or the case has been taken under advisement, viz, passed for a pre-sentence report. *Jackson v. State*, 590 S.W.2d 514 (Tex.Cr.App. 1979). On the other hand, a trial judge is not required to *sua sponte* withdraw a guilty plea even if evidence of obvious innocence or evidence fairly raising a issue of guilt appears. *Moon v. State*, 572 S.W.2d 681 (Tex.Cr.App. 1978).

The Texas Court of Criminal Appeals distinguished previous caselaw in *Payne v. State*, 790 S.W.2d 649 (Tex.Cr.App. 1990), and held when a significant factual issue arises as to the defendant's guilt, which also questions the voluntariness of the confession, it cannot

generally be said that the refusal to allow withdrawal of the plea is harmless beyond a reasonable doubt.

If the Petitioner had pled not guilty and the prosecution had offered incriminating hearsay in a similar vein, without objection, that hearsay would have been sufficient to sustain the conviction. *Chambers v. State*, 711 S.W.2d 240 (Tex.Cr.App. 1986); see also Tex.R.Ev. 802.

Here, the trial judge never indicated she disbelieved the testimony.

It might be argued here that all that is involved is the denial of a procedural right of exclusively state concern. Where, however, a State has provided an unobjected-to hearsay rule that will fend off a sufficiency claim, yet declines to acknowledge the converse of the rule in the context of a withdrawal of a guilty plea, where the defendant's burden is less, the due process provision of the Fourteenth Amendment is implicated. Cf. *Chambers v. Mississippi*, 410 U.S. 284 (1973), *Hicks v. Oklahoma*, 447 U.S. 343 (1980), *Vitek v. Jones*, 445 U.S. 480 (1980), and *Green v. Georgia*, 442 U.S. 95 (1979).

Petitioner's claim to withdraw his plea as to Count 2 cannot be disputed. The testimony of Candice Shelton, although hearsay, but unobjected to, and Petitioner clearly raised an issue of "actual innocence"; consequently, the refusal to allow Petitioner to abandon the plea was not harmless since substantial evidence existed that he was not guilty of the charged offense. *Payne v. State, supra*. The Court of Appeals ignored this highlighted detail of the claim, believing that the only issue was Petitioner's belief that one of the victims and her mother would testify that he should receive probation.

Petitioner's testimony, along with that of Candice Shelton, undermined the factual validity of his judicial confession. State's Exhibit 1, *Payne*, supra, at 652.

The testimony of the witnesses above raised an issue of voluntariness regarding the judicial confession. *Payne v. State, supra.*

Accordingly, the failure of the trial court and the Fourteenth Court of Appeals to consider or acknowledge the issue when authorized by caselaw and statute prejudiced Petitioner.

CONCLUSION

For the foregoing reasons, it is requested that the Court grant his petition for certiorari.

Respectfully submitted,

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September 1995

APPENDIX A

(Opinion Filed November 17, 1994)

IN THE FOURTEENTH COURT OF APPEALS

No. C14-92-00867-CR

JAMES MILFORD SEABOLT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 586224

OPINION

Appellant appeals his conviction of two counts of sexual assault of a child. TEX. PENAL CODE ANN. § 22.011(b) (Vernon Supp. 1994).[1] Appellant waived his

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1 The crime for which appellant was convicted was committed before September 1, 1994, the effective date of the revised penal code. See

right to trial by jury and, without an agreed punishment recommendation, entered a plea of guilty to count 1 and plea of *nolo contendere* to count 2. Prior to sentencing, appellant attempted to withdraw his pleas. The trial court denied his request and assessed punishment at imprisonment for twelve (12) years. In two points of error, appellant complains of the trial court's denial of his motion to withdraw his pleas. We affirm.

A defendant has the right to withdraw a guilty plea for any reason until judgment has been pronounced or the case is taken under advisement. After that point, it is within the trial court's discretion to allow the defendant to withdraw his guilty plea. *Jackson v. State*, 590 S.W.2d 514, 514 (Tex.Crim.App. 1979); *Davis v. State*, 861 S.W.2d 25, 26 (Tex.App.--Houston [14th Dist.] 1993, pet. ref'd). In this case, appellant entered his pleas, but the trial court withheld a finding of guilt while a presentence investigation (PSI) report was prepared. It is well-settled Texas law that passing a case for a PSI constitutes "taking the case under advisement." *Davis*, 861 S.W.2d at 26. *See* also *DeVary v. State*, 615 S.W.2d 739 (Tex.Crim.App. 1981); *Jackson v. State*, 590 S.W.2d 514, 514 (Tex.Crim.App. 1979); *Thompson v. State*, 852 S.W.2d 268 (Tex.App.--Dallas 1993, no pet.); *Cano v. State*, 846 S.W.2d 525 (Tex.App.-- Corpus Christi 1993, no pet.). Thus, whether to grant appellant's request was

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Acts 1993, 73rd Leg., ch. 900, § 1.18(b). Therefore, all references to the penal code are to the code in effect at the time the crime was committed.

within the trial court's discretion.

Nonetheless, appellant argues that his pleas were involuntary because he mistakenly believed that one of the victims and her mother would testify that he should receive probation. While a plea of guilty or *nolo contendere* should not be accepted unless it appears the plea is voluntary, once a defendant agrees to the terms of a plea bargain, voluntariness is presumed. *Benjamin v. State*, 874 S.W.2d 132, 134 (Tex.App.--Houston [14th Dist.] 1994, no pet.). Once a defendant is aware of the direct consequences of this plea, a guilty plea is voluntary unless the plea was induced by threats, misrepresentations, or improper promises by the prosecution or the court. *Bray v. United States*, 397 U.S. 742, 755 (1970); *Ex Parte Evans*, 690 S.W.2d 274, 276 (Tex.Crim.App. 1985). A valid, intelligently made plea does not become "vulnerable to later attack if the defendant did not correctly assert every relevant factor entering into his decision." *Evans*, 690 S.W.2d at 277 (quoting, *Brady*, 397 U.S. at 757).

Appellant's plea hearing clearly indicates that he was fully informed of the consequences of his plea and he entered his plea voluntarily. Specifically, the court found him to be competent and he clearly indicated that he entered the pleas freely and voluntarily. Moreover, appellant signed a statement waiving his right to trial by jury, his right of confrontation, and his right against self-incrimination. In the statement, he also indicated that the charges against him were true and he entered his

pleas voluntarily and that the trial court did not abuse its discretion in denying his request to withdraw his pleas. Appellant's points of error are overruled and the judgment of the trial court is affirmed.

/S/ Norman R. Lee
Justice

Judgment rendered and Opinion filed November 17, 1994.

Panel consists of Justices Robertson, Cannon and Lee (sitting for Justice Daughn).

Do Not Publish - TEX.R.APP.P. 90.

APPENDIX B

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

June 7, 1995

COA#: 14-92-00867-CR

RE: Case No. 0118-95

STYLE: SEABOLT, JAMES MILFORD

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

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